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April 11, 2006

BY HAND DELIVERY / E-FILE

The Honorable Gregory M. Sleet
United States District Court
844 N. King Street
Wilmington, Delaware 19801

Redacted Version - Publicly Filed

Re: *National Starch and Chemical Investment Holding Corp. et al. v. Cargill Corp. et al.*, Civ. Act. No. 04-1443 GMS

Dear Judge Sleet:

Pursuant to the Court's Amended Briefing Scheduling Order of April 3, 2006, Plaintiffs National Starch and Chemical and Penford respond to the request of Defendants Cargill, Inc. and MGP Ingredients to file summary judgment motions on certain issues. As set forth below, and in Plaintiffs' opening letter (requesting summary judgment that the patent-in-suit is valid), Defendants will be unable to establish as a matter of law that the patent-in-suit is invalid under any provision of 35 U.S.C. § 112. As such, Plaintiffs request that the Court deny Defendants' request to file a summary judgment motion regarding invalidity of the patent-in-suit.

Defendants, in cryptic fashion, appear to first argue that the '454 patent is invalid for lack of written description and/or enablement under the requirement of Section 112, paragraph 1. However, the facts regarding both written description and enablement support a finding that the patent-in-suit is valid. Further, as set forth herein and in Plaintiffs' opening letter, REDACTED

REDACTED Thus, defendants' proposed motion is futile and should not be permitted.

Finally, Defendants argue, albeit briefly, that they should be allowed to file summary judgment concerning willfulness and lost profits damages. Each of these requests should be denied summarily because there are factual issues in dispute, as set forth below.

I. Defendants' Request for Summary Judgment Regarding Invalidity

A. The alleged "errors" claimed by Defendants are red herrings

Defendants recite four alleged "errors" within the '454 patent that supposedly render the '454 patent invalid under section 112. However, as set forth below, Defendants grossly exaggerate the extent of the alleged "errors" and in fact, these are not errors at all. Also, a fatal flaw in Defendants' analysis is their failure to discuss how a person of ordinary skill in the art would consider any of these alleged "errors"

REDACTED

REDACTED

This is simply incorrect.

REDACTED

REDACTED

Therefore, it would have been misleading to include a correction factor within the calculations of the patent, because that number would change.

REDACTED

REDACTED

Defendants next argue that the defatting procedure set forth in the patent is incorrect,

REDACTED

However, as set forth in Plaintiffs' opening letter, this is trivial in nature and does not render the patent invalid.[1]

REDACTED

Defendants do not even recite what experimentation is necessary, if any, in order to practice the invention.

Finally, Defendants make the allegation that the failure to include a specific time period for cooling the solution prior to testing renders the '454 patent invalid. However, whether or not a time period for cooling is included within the patent is irrelevant. Any person skilled in the art of amylose analytical testing would understand that a consistent cooling period is necessary before testing the solution for amylose content. The patent does not need to describe such a trivial step in a routine analytical test.

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[1] Further, Defendants do not provide any specific legal analysis concerning their section 112 contentions, because clearly, there are different legal requirements regarding written description and indefiniteness.

REDACTED

B. There is no factual dispute that the blue value test is reproducible

REDACTED

REDACTED

REDACTED

As set forth below, there is no factual dispute that the test is both reproducible and it does not inflate apparent amylose results.

REDACTED

REDACTED

REDACTED

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[2] Defendants exclusively rely upon information outside of the '454 patent to indicate that the testing method that is set forth gives improper results. However, it is unclear how this is relevant to issues of whether the '454 patent meets the requirements of section 112.

[3] Defendants do not cite to their own expert testimony and internal documents in their opening letter.

REDACTED

Defendants also rely on testing performed by National Starch during European Opposition proceedings. However, Defendants' reliance on this testing is also unavailing.

REDACTED

and REDACTED Further, that the state of the art may have progressed,

There is no dispute that when the test in the '454 patent is performed by persons skilled in the art, the test is reproducible and accurate.

C. The patent-in-suit is enabled

Defendants also appear to argue the '454 patent is not enabled. Yet, Defendants do not contend that the hybrid seed invention of the '454 patent (or the starch invention of the '840 patent) was not in the possession of the inventors. In fact, the inventors deposited their hybrid seed invention with the ATCC, which establishes a per se enablement. There is no question that the inventors were the first to create a hybrid seed with high levels of amylose content.

REDACTED Therefore, Defendants cannot refute this per se enablement. Finally, the '454 patent contains working examples of hybrids that were created and tested and Defendants do not contend that any of these examples are not working examples.

Therefore, as set forth in Plaintiffs' opening letter, the test is reproducible and does not provide inflated results when performed by people skilled in the art

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REDACTED

D. Defendants' willfulness motion is factually disputed

REDACTED This is simply untrue and disputed.

REDACTED

E. Defendants' lost profits damages motion is factually disputed

REDACTED

This is a factual dispute and no discovery has been provided by Cargill to support this contention.

REDACTED . Finally, Plaintiffs have asked for discovery concerning the alleged sales of Defendants' products, and expert depositions have not yet occurred.

Conclusion

At the very least, there are issues of material fact regarding Defendants' request, and Plaintiffs ask this Court to deny Defendants' request to file summary judgment on these issues.

Respectfully submitted,

Monté T. Squire (No. 4764)

cc: Clerk of the Court (by e-filing / hand delivery)
Thomas L. Halkowski, Esq. (by e-filing / hand delivery)
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CERTIFICATE OF SERVICE

I, Monté T. Squire, Esquire, hereby certify that on April 17, 2006, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on April 17, 2006, I caused a copy of the foregoing document to be served by hand delivery on the above-listed counsel of record and on the following non-registered participants in the manner indicated:

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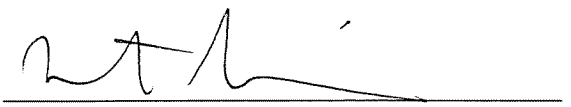

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